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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204404
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DAVID M. HOLDER,)
)
Opposer/Petitioner)
)
v.)
)
VINCENT MOTORS LLC,)
)
Applicant/Respondent)

Opposition No. 91204404
Cancellation No. 92055541

PLAINTIFF'S RESPONSE TO APPLICANT'S MOTION TO STRIKE

Applicant has moved to strike the Declarations of John Healy and Patrick Godet because:

1. Applicant was denied the ability to respond to the Declarations, and
2. Discovery was allegedly withheld on the information those Declarations contain.

Neither ground is sufficient or correct, and the motion should be denied.

I. THE DECLARATIONS ARE RESPONSIVE

The declarations of John Healy and Patrick Godet merely supplement and corroborate the Declaration of David Holder that Coventry Spares and Patrick Godet are and long have been licensees selling products in the U.S. under the “Vincent” trademark.

Also, the Healy Declaration, in paragraph 10, rebuts the inference in Defendant’s Brief that the Coventry Spares website constitutes a misuse of the “Vincent” trademark¹.

The Godet Declaration corroborates Mr. Holder’s claim that Godet is a licensee and also rebuts the inference by Defendants that the sale of motorcycles in the U.S. was unlicensed.

II. WITHIN THE DISCRETIONARY POWERS OF THE BOARD

Defendants allege they have been denied the opportunity to respond to the licensee’s Declarations. However, they have taken the opportunity to respond at length in their brief in support of the motion to strike. Therefore, they have not been denied the opportunity.

Furthermore, the Board has the discretion, under Rule 56(e), to consider any such Declarations².

In the Shalom case³, the Board stated:

Under Fed. R. Civ. P. 56(e), the Board may permit the parties to supplement their summary judgment affidavits or to submit additional affidavits. We exercise our discretion under the rule in favor of considering the additional evidence offered with opposer’s reply brief.

¹ Page 18 of Defendant’s main Brief, repeated in footnote 3 of the Motion to Strike.

² Shalom Children’s Wear, Inc. v. In-Wear A/S, 26 USPQ 2d 1516 (TTAB, 1993)

³ 26 USPQ 2d at page 1517

As it is stated in Handelman Guide to TTAB Practice, §16.06 (Wolters Kluwer):

“A party may supplement its submissions on summary judgment if necessary to clarify the record or to correct misleading or unwarranted inferences that could be drawn from existing submissions.”

This discretion is consistent with the discretion that a federal court has to accept such supplements, at least where, as here, the opposing party has had an opportunity to respond.⁴

Therefore, the Declarations should be considered by the Board.

III. NO FAILURE OF DISCOVERY

Defendants assert that the Declarations and Exhibits would not be admissible, even if timely, due to Holder’s “refusal” to give discovery on the subject of “agreements relating to the licensing of sales in the U.S.”⁵, when Plaintiff named Coventry Spares as the “main licensee,” but failed to name Patrick Godet.

Plaintiff did not refuse to give discovery as to any of its licensees.

First, the response to Interrogatory 16 was, by its terms, not intended to list all licensees, but merely to give a sampling. Thus, Dunhill, Coventry and a British company were named.

Furthermore, Defendants got full discovery regarding Coventry Spares and Patrick Godet when Mr. Holder came to the U.S. and gave his discovery deposition in June of 2013.⁶ Several pages of testimony were given on each licensee. Copies of those pages are attached hereto as Exhibits 1 and 2; Exhibit 1 being pages 37-43 and 78-79 of testimony about Mr. Godet, and Exhibit 2 being pages 67-78 of testimony about Coventry and Mr. Healy. It was disclosed in the Holder deposition that both Coventry and Godet were dealers and, therefore, licensees, and that

⁴ Acumed LLC v. Stryker Corp., 551 F3rd 1323, 1332 (Fed. Cir. 2008), cited at page 2 of Defendant’s brief.

⁵ Interrogatory #16, in Exhibit A to Defendant’s Brief.

⁶ Plaintiff was not allowed to use Mr. Holder’s deposition testimony as evidence in support of the Motion for Summary Judgment, but is allowed to use it to rebut Defendant’s erroneous assertions.

Mr. Godet was the dealer who made and sold the motorcycle bought by Jay Leno in late 2012, and the motorcycles sold to Dunhill earlier.

The thorough examination of Mr. Holder concerning Mr. Godet, Coventry and Mr. Healy gave Defendant ample information to enable them to ask about any agreements when deposing Mr. Holder, which they did. Also, Defendant could have taken the testimony of Mr. Healy and Mr. Godet, had Defendant chosen to do so.

The testimony in the Declarations cannot truly be a surprise to Defendant and would be admissible, at least as rebuttal testimony.

IV. DEFENDANT'S CRITICISM OF THE DECLARATIONS

In footnote 2 of Defendant's Brief, the Godet Declaration is criticized because it allegedly states that the business with Mr. Holder is transacted entirely in the European Union, not the U.S.

This is incorrect. The Godet Declaration (paragraph 5) states that his company manufactured the motorcycle bought by Jay Leno in the U.S. in 2012, and that his company has made and sold an estimated 20 such machines in the U.S. (paragraph 9). Also, he states (paragraph 4) that three such machines were sold to Dunhill for use in its U.S. ad campaign.

Defendant's further assertions that sales from Europe might not qualify as use in the U.S. are simply wrong.

Defendant's reliance on the law holding that mere importation does not, by itself, constitute use in commerce is not on point. Godet has made and sold, and continues to make and sell "Vincent" motorcycles into the U.S., and this use inures to Holder's benefit because Godet is Holder's dealer or licensee.

It makes no difference how the motorcycles sold get to the U.S.; once Godet's company places the products in commerce, this constitutes "use in commerce" when they get to the U.S. Grand River Enterprises Six Nations v. VMR Products, LLC (W.D.Wis. 5-29-2014) (13-CV-104-WMC) citing: In Re Silenus Wines, Inc. 557 F2d 806 (CCPA, 1977) and quoting from Labratorios Roldan, C por A. v. Tex International, Inc., 902 F. Supp. 1555 (S.D. Fla, 1995) as follows:

Who actually distributes the product to the end user is irrelevant; what is relevant is who was the actor that placed the product with the mark into commerce...Since Plaintiff placed the mark on the product at the point of production, and was the first to distribute the product into the stream of commerce, and since the product with the mark was distributed into the United States marketplace, it is irrelevant that Plaintiff did not, itself, send the product into the United States.

Therefore, Defendant's attack on the merits of the Godet Declaration is without merit.

Defendant's criticism⁷ of the Healy Declaration is simply a repeat of the criticism in the main brief⁸, to which Plaintiff responded in its Reply Brief⁹ with the aid of the Healy Declaration—to the effect that the use of the "Vincent" name on the Coventry home page is "fair use" needed to identify the motorcycle for which the parts are made.

V. CONCLUSION

The Healy and Godet Declarations are responsive to Defendant's assertions, and are effective to corroborate the testimony in Mr. Holder's Declaration.

Defendant had full opportunity to question Mr. Holder about those dealers, and did so. Defendant was not denied the opportunity to depose Mr. Healy and Mr. Godet, had it chosen to do so.

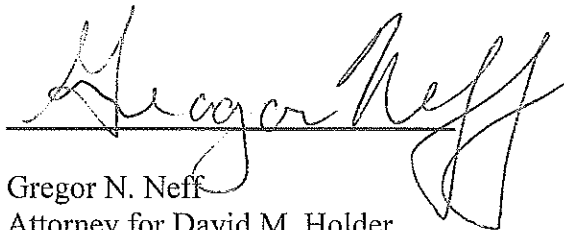
⁷ Also in footnote 3.

⁸ Page 18.

⁹ Pages 4-5.

Defendant now has had an opportunity to respond to the Declarations and they should be considered by the Board in deciding the summary judgment motion.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Gregor Neff", written over a horizontal line.

Gregor N. Neff
Attorney for David M. Holder

Dated: August 27, 2014

Law Office of Gregor N. Neff
489 Fifth Avenue, 12th Floor
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646-619-8138

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing PLAINTIFF'S RESPONSE TO APPLICANT'S MOTION TO STRIKE and EXHIBITS 1 and 2 were served upon the following attorneys of record for Applicant by e-mail on the 27th day of August 2014:

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Hi Soo Sung

EXHIBIT 1

Pages 37-43 and 78-79 of Holder Deposition

1 Holder

2 A. Yes.

3 Q. Do you see in the next line there
4 it has a first -- the date of first use in
5 commerce, do you see that in the next
6 paragraph?

7 A. That's where it says, "1927"?

8 Q. It says, "Mark was first used by
9 the applicant and applicant's related company
10 or licensee at least as early as December 31,
11 1927"?

12 A. Yes.

13 Q. "And first used in commerce at
14 least as early as December 31, 1946"; is that
15 what it says?

16 A. Yes.

17 Q. Have you ever sold a VINCENT
18 motorcycle in the United States?

19 A. Yes, I'll qualify that.
20 Motorcycles that we've sent to the United
21 States have been pretty small in number. And
22 we've sent them via a dealer in the UK or in
23 France or elsewhere, not directly ourselves.

24 Q. When you say not directly
25 yourselves, what do you mean by that?

Holder

1
2 A. We have not supplied the customer.
3 We've supplied via third party.

4 Q. When was the last time that that
5 sale occurred or such a sale occurred?

6 A. I can remember a sale from about
7 the end of last year. I can remember two or
8 three -- we looked at what we got in the
9 U.S., so we've got just a small number of
10 sales.

11 Q. Let's talk about the sale last
12 year.

13 Do you know who that was sold
14 through, which dealer?

15 A. That got sold through Bonhams and
16 the customer was Jay Leno. B-O-N-H-A-M-S, I
17 think that's was the auctioneer selling it.
18 It's my knowledge that they were the
19 auctioneer selling it. Certainly the
20 customer was Jay Leno.

21 Q. Was this a VINCENT that was
22 manufactured by Velocette Vincent HRD?

23 A. That's a VINCENT motorcycle that
24 has been put together from new parts by one
25 of our dealers recently.

Holder

Q. Who was the dealer?

A. That was Patrick Godet and Friends.

Q. Was that in relationship to the Dunhill project?

A. No.

Q. And you said the sale was through an auctioneer; is that right?

A. I think it was. As I understand it, it was. Yeah, it was. I remember it, it was.

Q. Was it a VINCENT or an Egli Vincent?

A. It's an Egli Vincent.

Q. An Egli Vincent.

What is the difference between a VINCENT and an Egli Vincent?

A. It's just the later model. It's the last model of the classic period, if you would like.

Q. The Egli Vincent that was assembled by Mr. Godet, was that assembled with parts manufactured by Velocette Vincent?

A. Correct.

Q. Who actually sold that VINCENT

1 Holder

2 motorcycle to the -- or provided -- let me
3 rephrase that.

4 Who provided that VINCENT
5 motorcycle to the auctioneer for sale?

6 A. I don't know. Not Mr. Godet, I
7 believe.

8 Q. Was it provided by you to the
9 auctioneer --

10 A. No, it was not.

11 Q. Was it provided by Velocette
12 Vincent to the auctioneer for sale?

13 A. No, no.

14 Q. Did the Egli Vincent that was sold
15 through the auctioneer last year, did it
16 include any spare parts that were not
17 manufactured by Velocette Vincent?

18 A. Perhaps or probably even maybe. I
19 don't know. I don't know an answer to that.

20 Q. So other than that sale through the
21 auctioneer last year, prior to that, can you
22 remember at any time before that that you
23 sold a VINCENT motorcycle in the U.S.?

24 A. I believe about two of the Bonham
25 ones -- sorry, that's wrong. Two of the

Holder

Dunhill models. One that was in their showroom ended up sold in New York.

Q. Was that VINCENT motorcycle sold by you personally?

A. No. No. The sales to the U.S., none of them have been by me or the Vincent HRD company.

Q. Okay. I want to make sure so the record is clear. So have you personally ever sold a VINCENT motorcycle in the United States?

A. Only indirectly.

Q. And --

A. Or only via third party.

Q. And has Velocette Vincent ever sold a VINCENT motorcycle directly into the United States?

A. We're talking about new ones here not --

Q. Yes.

A. -- not restored ones?

Q. Yes.

A. Yes. Okay.

We're talking about new ones. Ever

1 Holder

2 sold directly? If you're going back a while,
3 yes.

4 Q. How far back?

5 A. You might need to go back ten
6 years.

7 Q. Do you remember who you sold it to?

8 A. No, just an individual. Usually
9 you would sell something like that to an
10 American visiting Europe.

11 Q. So was that sale to an American who
12 was in England, or did you actually go out
13 and sell it and advertise it to someone in
14 the U.S.?

15 A. The guy would come visit you.

16 Q. And then you would ship it to the
17 United States?

18 A. Yes.

19 Q. Do you have any documentation
20 showing that sale?

21 A. There would be a few of those
22 sales. I would expect that there may be some
23 documentation, although it is a period of
24 time ago where there may not as well.

25 Q. If there was any such

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Holder

documentation, have you provided that to you
counsel?

A. I believe not. That's of the
earlier ones, I believe not.

Q. Right.

When you say "earlier ones," what
timeframe are you talking about?

A. About ten years or more ago.

Q. So 1980s, 1990s?

A. Yes.

Q. Now, you mentioned restored
motorcycles, restored VINCENT motorcycles.
Have you personally sold any restored VINCENT
motorcycles to customers in the United
States?

A. Again, we weren't trying to do that
directly nowadays.

Q. So the --

A. But indirectly the United States
would be a fair market.

Q. So the answer is no?

A. I'm not sure the answer isn't yes.

Q. But do you have -- as you're
sitting here today, do you have any

1 Holder

2 Q. Right. Understood.

3 I would imagine most of your
4 business with Mr. Healy is sales of VINCENT
5 parts?

6 A. Yes.

7 Q. Now, you mentioned earlier that you
8 had a deal with Dunhill.

9 A. Yes.

10 Q. And is Dunhill a British company?

11 A. Yes.

12 Q. When was that deal approximately?

13 A. It's about ten years ago now. I
14 think it is.

15 Q. I noticed Dunhill sold clothing; is
16 that right?

17 A. Yes.

18 Q. There was a motorcycle, an Egli
19 Vincent created for that campaign; is that
20 right?

21 A. Yes, more than one. I believe they
22 asked for six and ended up with three
23 delivered.

24 Q. Did you assemble those, or did
25 someone else assemble those?

Holder

A. Mr. Godet --

Q. Mr. Godet.

A. -- in the similar sense to what we did. I believe in the similar sense as to the way we answered earlier questions.

Q. That clothing included leather jacket; is that right?

A. Also, it's, again, almost did the toffy apple again. You know the shop? It's -- well, I don't know my directions. They have a New York store. Okay.

Q. Do you know if the clothing they sold actually -- did the clothing actually have the VINCENT mark on it?

A. Oh, yeah.

Q. Where was it on the clothing?

A. They tend to put it fairly discreetly wherever they thought (indicating) it wanted to be.

Q. Did Dunhill pay you any --

MR. BRATER: I'm sorry, this is going to be marked confidential.

(The following portion has been deemed confidential and bound under separate cover.)

EXHIBIT 2

Pages 67-78 of Holder Deposition

Holder

1
2 Q. So is Coventry Spares Limited a
3 licensee?

4 A. Yes.

5 Q. That's Coventry Spares Limited in
6 Middleboro, Massachusetts?

7 A. Yes.

8 Q. And is that a licensee of Velocette
9 Vincent or a licensee of you personally?

10 A. Good grief. Again, I wouldn't -- I
11 wouldn't normally need to make the
12 distinction.

13 Q. Fair enough.

14 Do you have a written agreement
15 with Coventry?

16 A. Goodness. There might be one from
17 the distant past somewhere, and we probably
18 both be amused if we could look at it again.

19 Q. And how long have they been a
20 licensee of yours?

21 A. Right back to me dad's day.

22 Q. I assume that you sell VINCENT
23 spare parts through Coventry?

24 A. Yes.

25 Q. Do you sell clothing through

Holder

Coventry?

A. Coventry does his own clothing. He didn't want to import it via us. He did do it in the past.

Q. He has sold your clothing in the past?

A. He has in the past.

Q. Do you know when?

A. That is going to go back quite a long time. He's doing his own thing in at least 10, maybe 15 years.

Q. And have you given him a license to do clothing?

A. Oh, yes. Yes.

Q. Do you know if he sells the clothing online?

A. Yeah, I believe he does. Although ^{not} that's his main way of selling.

Q. Do you know when he started selling the clothing online?

A. No, I don't.

Q. Are you familiar with the Coventry website?

A. I know there is one.

Holder

1 MR. BRATER: I'm going to hand to
2 the court reporter what has been marked
3 as VM 00180 to 182, which we will mark as
4 Holder Exhibit 2.
5

6 (Holder Exhibit 2, printout from
7 Coventry Spares Limited website, labeled
8 VM 00180 to 182, dated January 31, 2013,
9 marked for identification, as of this
10 date.)

11 Q. Mr. Holder, let me know when you've
12 had a chance to take a look at this.

13 A. Okay. I've got it.

14 Q. Do you recognize what this is?

15 A. Yeah, I think I do.

16 Q. What is it?

17 A. It's a catalog of Coventry Spares,
18 Limited.

19 Q. Is this from Coventry Spares
20 Limited's website?

21 A. I have no idea.

22 Q. Do you know whose website
23 www.thevincentparts.com is?

24 A. That sounds like Coventry's. I
25 apologize. It does appear to be Coventry's

1 Holder

2 website. Sorry.

3 Q. If you don't know, that's okay.

4 If you look at the upper right
5 corner, what is the date there of the first
6 page?

7 A. I don't seem to have one.

8 Q. Underneath the "VINCENT" logo in
9 the upper right corner.

10 A. Okay. January 31, 2013.

11 Q. Would you assume that this is the
12 Coventry parts' list as of that date?

13 A. Sounds a fair assumption.

14 Q. Let's turn to the second page,
15 which is VM 00181. Do you see that there is
16 a hat and a T-shirt there?

17 A. Yes, yes.

18 Q. Is that a hat and a T-shirt that
19 you or Velocette Vincent had created?

20 A. I think that's our logo onto a
21 T-shirt that's made in the USA. I believe
22 the manufacturer was -- is that Hanes --
23 was that Hanes, BT or was it Fruit of -- I
24 can't remember who the manufacturer was, but
25 respected made in the USA.

1 Holder

2 Q. Is this an example of the clothing
3 that Coventry did on its own?

4 A. Yes. That's Coventry's clothing,
5 yeah.

6 Q. Did you review these products
7 before Coventry created them?

8 A. Yes, yes.

9 Q. Did he send you specimens, or what
10 happened?

11 A. Yes. He brought us some over and
12 nobody in the UK -- well, I'm not wearing the
13 baseball cap. I'll wear the T-shirt because
14 you wouldn't wear a baseball cap. That's an
15 American thing.

16 Q. Do you know when he showed these to
17 you?

18 A. He used to bring us some over every
19 time he came because he seemed to think we
20 needed some. To expand on that, he used to
21 visit us yearly and stayed with us in our
22 house for about a week while he was over.
23 And he would almost always bring --

24 MRS. HOLDER: Always bring --
25 sorry.

1 Holder

2 A. -- some of the clothing over.

3 Q. Would he bring the clothing to you
4 before he started selling it, or he would
5 just --

6 A. No, he brought the first ones in
7 the first place. His idea is to, what he
8 thought the American market wanted, and what
9 did we think of these.

10 Q. But he would show them to you
11 before he sold them?

12 A. Yeah, yes. I'm sorry.

13 Q. That's okay.

14 A. I'm saying too much.

15 Q. I assume that the approval you
16 would provide would be -- would be oral not
17 written?

18 A. Again, this is tending to be the
19 case.

20 MR. NEFF: Are you going to mark it
21 as an exhibit?

22 MR. BRATER: I already did.

23 MR. NEFF: I'm sorry. I missed it.
24 What is it, Holder 2?

25 MR. BRATER: Yes.

1 Holder

2 I'm going to hand to the court
3 reporter a document marked VM 00183
4 through 185 and ask that it be marked as
5 Holder Exhibit 3.

6 (Holder Exhibit 3, different
7 printout from Coventry Spares Limited
8 website, labeled VM 00183 through 185,
9 dated January 31, 2012, marked for
10 identification, as of this date.)

11 Q. Now, does this appear to be
12 another -- a different copy of the Coventry
13 website with spare parts on it?

14 A. Yes, it does.

15 Q. And the date in the upper right
16 corner is January 31, 2012; is that right?

17 A. Yes.

18 Q. Do you see on here -- do you see
19 any clothing or hats?

20 A. No.

21 Q. Do you know why the website in 2013
22 included clothing and hats, but not in 2012?

23 A. Well, I recognize this website and
24 find it to be maybe 60, 70 pages long.
25 You've only got three of them there.

1 Holder

2 Q. But do you know if clothing was on
3 the website in 2012?

4 A. Well, I don't know. I don't know.

5 Q. That's fair. If you don't know,
6 you don't know.

7 Do you know how much clothing with
8 the VINCENT logo on it Coventry has sold?

9 A. He tells me it doesn't set the
10 world on fire. That would be the same as
11 what I had found. So I'm going to guess some
12 and nothing to get too excited about.

13 Q. Would that be ten T-shirts a year,
14 a hundred T-shirts a year?

15 A. I'm sure it's not ten. I'm sure
16 it'd been more than a hundred, but I'm sort
17 of guessing. I don't suppose it's into -- if
18 it's into any thousands, he's not telling me
19 it's into any thousands.

20 Q. Does he report sales of clothing --

21 A. Not in a precise manner. We're
22 maybe have the conversation, "do we owe each
23 other anything for the clothing this year?"

24 Q. Does he pay you a specified royalty
25 for sales of the clothing with the VINCENT

Holder

1 mark?

2 A. No, not in that sense, no.

3 Q. Would he pay you anything for sales
4 of clothing with the VINCENT mark in the
5 U.S.?

6 A. We're looking like more in the
7 promotional sort of sense and see if we could
8 catch the world out, and in advance of the
9 discussion, we add on, do we owe each other
10 anything, and instead having a beer
11 instead --

12 Q. Fair enough.

13 A. -- I expect he would have done.

14 Q. When we say "he," who --

15 A. That's John Healy. John Healy.

16 Q. John?

17 A. Healy.

18 Q. John Healy.

19 A. H-E-A-L-E-Y.

20 MRS. HOLDER: I think it's
21 H-E-A-L-Y, isn't it? There's not an "E"
22 in there.

23 THE WITNESS: I should know that.

24 MRS. HOLDER: H-E-A-L-Y, I believe.

25

1 Holder

2 THE WITNESS: That's correct.

3 Q. You said you do not have a written
4 agreement with Mr. Healy or if you do --

5 A. I actually believe there was one in
6 the early days that would almost be fun to
7 dig out. We're friends. We've dealt with
8 each other for a long time if that explains
9 it a little better.

10 Q. Do you have any documentation from
11 him that shows his sales of clothing with the
12 VINCENT mark in the U.S.?

13 A. No, no. Never specifically asked
14 him for anything. We discussed it and didn't
15 do it.

16 Q. What do you mean you discussed it
17 and you didn't do it?

18 A. Do we owe each other anything on
19 clothing?

20 Q. I understand.

21 A. And I would trust his answer.

22 Q. So you would discuss orally his
23 sales --

24 A. Yes.

25 Q. -- but you didn't get anything in

Holder

writing?

A. That's right.

Q. And has he ever paid you any money for sales of clothing with the VINCENT mark in the U.S.?

A. He would have bought clothing off me in the past.

Q. Right. So --

A. Has he paid me money for that? No, it's in the bigger scheme of thing. The answer to that is misleading if I say no.

Q. Has he paid any kind of royalty to you for sales of clothing with the VINCENT mark at any point in time?

A. Let's answer that with a qualified no.

Q. Qualified in what way?

A. It isn't quite how we do business. There was money there to be paid if it was a worthwhile amount. And I believe what he had told me was, and bear in mind that he's a big customer, there's little point in taking even a thousand pound off him in one hand to perhaps give it back in the other.

Holder

Q. Right. Understood.

I would imagine most of your business with Mr. Healy is sales of VINCENT parts?

A. Yes.

Q. Now, you mentioned earlier that you had a deal with Dunhill.

A. Yes.

Q. And is Dunhill a British company?

A. Yes.

Q. When was that deal approximately?

A. It's about ten years ago now. I think it is.

Q. I noticed Dunhill sold clothing; is that right?

A. Yes.

Q. There was a motorcycle, an Egli Vincent created for that campaign; is that right?

A. Yes, more than one. I believe they asked for six and ended up with three delivered.

Q. Did you assemble those, or did someone else assemble those?